Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

HOANG VAN TU, NGUYEN THI KHUONG; NGUYEN DINH; TRAN NAM; TRUONG THAIN; PHAM DAT; PHAM THI THUAN, and S. AUSTIN JOHNSON,

Petitioner(s)

vs.

PT. MICHAEL TERRY; LT. WILLIAM RUSTY CALLEY; and CPT. ERNEST L. MEDINA.,

Respondent(s)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

S. Austin Johnson
Johnson Law Firm, LLC
204 East 860 South
Orem, Utah 84058
(801) 426 – 7900
Attorney for Petitioners

Dennis R. Ickes, Esp.
Counsel of Record
4257 Panorma Dr.
SLC, UT 84124
(801) 272 – 0691

QUESTIONS PRESENTED FOR REVIEW.

The Tenth Circuit affirmed the district court's dismissal with prejudice of Defendants Lt. William "Rusty" Calley and Private Michael Terry in this cause of action for civil damages for war crimes, extrajudicial killings and other atrocities committed on March 16, 1968, at the village of My Lai, Vietnam. Plaintiffs, class representatives of the victims of the My Lai Massacre, sought to recover civil damages for the injuries suffered by filing causes of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619 (1971)("Bivens" action), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. Section 1350. The causes of action were held to be time-barred by the Torture Victim Protection Act, which was enacted 24 years after the cause of action accrued, and by the four year personal injury limitation of action statute in the State of Utah. The court ruled that no tolling provision extended these causes of action so they were time-barred. In holding that the causes of action were time-barred, the Tenth Circuit decision directly conflicts with holdings of this Court, the Supreme Court of the State of Utah, and the Ninth Circuit, which recognize tolling of these causes of action during a time of war.

Three Questions are presented:

I. Whether the U.S. soldiers who acted under color of federal law and committed extrajudicial killings and rape at My Lai, Vietnam, on March 16, 1968, may be liable in a *Bivens* action for injuries and death caused by their unlawful conduct because the Four year limitation period for bringing the cause of action was tolled by extraordinary circumstances, including war and lack of recognition of a country following the war.

II. Whether the U.S. soldiers who committed the extrajudicial killings and rape of the civilians at My Lai, Vietnam, are liable for damages under the ATCA because the 10 year statute of limitations was tolled by extraordinary circumstances including the war, non-recognition of the enemy country, poverty, lack of freedom of travel, and other circumstances.

III. Whether it was an abuse of discretion for the trial court to award attorneys fees against Plaintiffs and their counsel for bad faith in bringing vexatious

litigation if the cause of action was timely filed.

LIST OF PARTIES TO PROCEEDING.

The parties are Hoang Van Tu, Nguyen Thi Khuong, Nguyen Dinh, Tran Nam, Truong Thain, Pham Dat, and Pham Thi Thuan. These plaintiffs are seven victims of the My Lai massacre. They all reside in and are citizens of Vietnam. They are class representatives of all of the victims of the My Lai massacre.

Defendant-Appellee Lt. William "Rusty" Calley was the commanding officer of Charlie Company who led the military operation against the village of My Lai on March 16, 1968.

Defendant Private Michael Terry is a resident of the State of Utah and was a participant in the military operation against the village of My Lai.

Captain Ernest L. Medina was a party to the action but he was dismissed without prejudice by the U.S. district court. The United States of America filed a brief on appeal in support of the trial court's dismissal of the action with prejudice against the two other defendants. Defendant Captain Medina had been previously dismissed without prejudice by

the district, which held that the district of Utah lacked minimum contacts with Captain Medina to satisfy personal jurisdiction requirements.

Other commanding officers and soldiers were named in the complaint but they have not been served and were not made parties to this cause of action.

Counsel for Plaintiffs, S. Austin Johnson, is a party to the extent that the district court held that he is liable for the attorneys fees incurred by Defendant Terry for bringing this vexatious cause of action in bad faith, after the statute of limitation had expired.

CORPORATE DISCLOSURE STATEMENT

No party to this action is a corporation, has stock issued or is publicly held. All parties are individuals.

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Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254. The U.S. Court of Appeals of for the Tenth Circuit entered a decision in this matter, which is a civil case. The federal district court had jurisdiction over the cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619 (1971)(*"Bivens"*), and 42 USC Section 1983; and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. Section 1350.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourth Amendment, U.S. Constitution, reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated....

Fifth Amendment, U.S. Constitution, reads:

No person shall be ... deprived of life, liberty, or property, without due process of law;

28 U.S.C. Section 1350, the Alien Tort Claims Act, ("ATCA") provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Torture Victim Protection Act (TVPA) was enacted by Pub.L. 102-256, 106 Stat.73, on March 12, 1992. It provides:

...

(2)(a) An individual who, under actual or apparent authority , or color of law, of any foreign nation — subjects an individual to torture shall, in a civil action, be liable for damages to that individual;

...

(c) Statute of limitations. --No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Section 78-12-25, Utah Code:

An action may be brought within four years:

...

(3) for relief not otherwise provided for by law.

Section 78-12-39, Utah Code (2002);

When a person is an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action.

STATEMENT OF THE CASE.

Plaintiffs are class representatives of the victims of the My Lai massacre that occurred on March 16, 1968. Each of the seven representatives are actual survivors of the massacre. They are citizens of Vietnam and domiciled at the Village of Son My, Quang Ngai Province, in Vietnam.

On March 16, 1968, the United States Army, under the command of Defendant Lt. William "Rusty" Calley, invaded the South Vietnam village of My Lai.

The soldiers detained, raped and executed or injured over five hundred non-combatant civilians, the vast majority of whom were women and children. The soldiers also set fire to the village, burning the homes to the ground. There are only about 45 known survivors of these atrocities.

Defendant Michael B. Terry was a fire team leader in the third platoon of Charlie Company on March 16, 1968. He assisted in carrying out military operations against the village. He is a resident of the State of Utah. Defendant Lt. Calley is a resident of the State of Georgia.

Plaintiffs filed this cause of action on October 12, 2000, stating a *Bivens* action and an Alien tort claim under 28 U.S.C. Section 1350. They claim money damages for wrongful death, pain and suffering, permanent disfigurement, battery, severe emotional distress, decreased enjoyment of life, loss of consortium, lost wages and earning capacity, past and future, and property damage.

Defendant Terry moved to dismiss plaintiffs' cause of action, arguing that it is time-barred by all relevant statutes of limitations. The U.S. District Court for the District of Utah granted the motion and dismissed all defendants on September 23, 2002, before any discovery or evidence was presented. See

Appdx. C.

Defendant Captain Medina was dismissed without prejudice because the district court held he did not have minimum contacts with Utah for the court to exercise personal jurisdiction over him.

Defendant Lt. Calley did not move to dismiss his cause of action based on his lack of contact with the State of Utah. His motion, on other grounds, was denied by the trial court. But when the trial court granted the motion to dismiss of Defendant Terry, it, *sua sponte*, dismissed the causes of action against Defendant Calley. It held the causes of action were time-barred. Appdx. A at 9a.

The Tenth Circuit followed the district court and applied the 4 year SOL for personal injury actions in the State of Utah and held that a *Bivens* action had to be filed by March 16, 1972, absent tolling. Opin. at 6. The Tenth Circuit also decided that the ATCA was time-barred by the 10 years statute of limitation, which it borrowed from the TVPA. Appdx. at 7a.

The Tenth Circuit held that plaintiffs failed to make a sufficient showing to toll the statute of limitation because of plaintiffs poverty, status as subjects of a Communist government, the Vietnam War, and their inability to travel. The court rejected

the equitable tolling argument. Appdx. A at 8a.

The Tenth Circuit also affirmed the district court award of attorneys fees to Defendant Terry in the amount of $12,055.50, finding it was not an abuse of discretion to award attorneys fees under the court's inherent power to sanction conduct that abuses the judicial process. Appdx. B.

REASONS FOR ALLOWANCE OF THE WRIT.

Whether a *Bivens* action and the ATCA action may be brought by aliens residing in the foreign country of Vietnam is an important question, implicating the extra-territorial application of the United States Constitution as a standard of conduct for, or imposing duties upon, United States troops abroad in a time of war in their conduct toward non-combatant civilians. This writ will help define the limits or acceptable and unacceptable bounds of conduct. U.S. soldiers are being used in foreign countries to quash growing terrorism in the world. The example of U.S. soldiers, and Americans, given during these difficult circumstances may have a great impact in opening other peoples minds and hearts to the principles of the U.S. Constitution and the high ideals, standards and virtues of the United States.

Soldiers serving in foreign countries, with extreme temperatures, in the midst of hostilities, may be frustrated by the limitations imposed in the settings, by the violence they experience, and by the lack of gratitude from their hosts. They protect the civilian population of those foreign countries from the terrorists, and install a modern, western system of constitutional law, democracy, and order with individual rights and privileges of freedom, liberty and worship in other systems of law and cultures. The examples of these soldiers and of our country make a great impact on the success of reaching these objectives. This example, governed by constitutional law, is a light set on a hill for all to see.

The individuals who make up the U.S. military are governed in their conduct toward non-combatant civilians of other countries by rule of law. These rules impose duties. The rule of law includes duties derived from the U.S. Constitution. These duties include keeping their actions within appropriate boundaries or limits. The law must impose these duties by setting and enforcing consequences for the breach of these duties. The *Bivens* action and the ATCA both provide a remedy to alien victims, who reside in foreign countries, who have suffered injury by outrageous, wanton tortious conduct by soldiers who violate these boundaries of acceptable conduct.

This Court, by granting a writ of certiorari, will validate the *Bivens* and ATCA cause of action as a means of protecting the rights and privileges of all mankind and giving redress for serious atrocities committed in a war setting against civilian non-combatants by U.S. actors. Recognizing these causes of action will reinforce the duties the U.S. Constitution imposes on our soldiers, wherever they are.

The Tenth Circuit opinion casts doubt on the existence of a *Bivens* action as a means for aliens abroad to protect themselves from unlawful conduct by U.S. troops. It casts doubt on whether the U.S. constitution imposes duties or standards of conduct on the troops who act under its auspices.

The Tenth Circuit opinion is contrary to this Court's direction that a federal statute of limitation, and federal tolling doctrines, should be used where the statutory or implied cause of action has no stated statute of limitation, and it directly implicates national issues.

The Tenth Circuit's decision in this case stands alone in holding that war does not toll the statute of limitations. This Court, in resolving conflicts between citizens of the Northern and Southern states after the end of the Civil War, recognized that war tolls the statute of limitations until the conflict is over. Similar case law in the State of Utah is in conflict with the Tenth Circuit's opinion as well. Citizens of an enemy state, during war are under a legal disability and are denied access to the courts of the United States. This disability tolls or extends the limitation period for

bringing a cause of action until the disability is over. This writ should clarify when the tolling period ceased or when the limitation of action period began to run after the end of the Vietnam War. The tolling of the statute of limitations is appropriate because of the extraordinary circumstances that arose from the Vietnam war.

The Tenth Circuit decision failed to incorporate federal tolling doctrine with the ATCA action when it decided that the claim was time-barred by the ten year statute of limitation of the Torture Victim Protection Act, enacted 24 years after the ATCA cause of action arose.

Review by this Court also is necessary to address additional important issues posed by the Tenth Circuit opinion. First, whether the absence of tolling may be decided on a motion to dismiss, instead of allowing Plaintiffs to discover and present facts in support of the claim for tolling. Second, whether Defendant Calley was properly dismissed *sua sponte* when he did not join in the motion to dismiss. And third, whether it is an abuse of discretion to award attorneys fees against counsel for Plaintiffs, and plaintiffs, for bringing this cause of action if it is not time-barred.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF A *BIVENS* ACTION TO OUTRAGEOUS TORTS COMMITTED IN FOREIGN COUNTRIES BY U.S. SOLDIERS

A *Bivens* Action allows victims of the My Lai massacre to claim compensation for the violation of rights protected by the U.S. Constitution:

Review is necessary in this matter because the Tenth Circuit, the Fifth Circuit, the D.C. Circuit, and Ninth Circuit are in conflict with this Court on whether the My Lai massacre victims may pursue a *Bivens* action for injuries they suffered in Vietnam, which were inflicted by U.S. soldiers who violated rights protected by the U.S. constitution.

Bivens is a judicially created remedy that allows recovery for damages against federal officials for violations of constitutionally protected rights, similar to 42 U.S.C. Section 1983, which allows recovery against state officials for violations of civil rights. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619 (1971). Aliens have limited due process rights. Officials may not consciously disregard or act with deliberate indifference toward a detainee's safety by knowingly placing that person in harm's way. Papa v. United States, 281 F.3d 1004, 1010 (9th Cir.2002); Lynch v. Cannatella, 810 F.2d 1363, 1375-76 (5th Cir.1987). A *Bivens* action exists against a federal official acting in his individual capacity for violation of constitutional rights. Bunn v. Conley, 309 F.3d 1002,1009 (7th Cir. 2002).

The circuit courts have taken away these rights by saying they do not apply to foreign citizens whose

rights of life, liberty and property are deprived by U.S. actors in foreign countries. The United States, on behalf of Captain Medina, argues that the U.S. Constitution does not apply to aliens whose claims arise outside the United States. Brief of Defendant-Appellee Medina, p. 33, in Van Tu v. Koster, 10th Cir. No. 02-4209, filed abt. Aug. 22, 2003, citing In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir.1994); Pauling v. McElroy, 278 F.2d 252, 254.n.3 (DC Cir.1960); Zadvydas v. Davis, 533 U.S. 678, 693, 150 L.Ed.2d 653, 669 (2001)("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.")

The Tenth Circuit followed this authority to doubt that a *Bivens* action is available for the victims of the My Lai massacre in Vietnam. Opin. at 4, citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (1985), ("[t]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.")

This Court should find that a *Bivens* remedy is available to the citizens of Vietnam for the atrocities they suffered at My Lai.

II. APPLICATION OF THE STATE STATUTE OF LIMITATION TO WAR CRIMES COMMITTED ABROAD CONFLICTS WITH THE PRINCIPLE OF APPLYING THE

MOST CLOSELY ANALOGOUS FEDERAL STATUTE.

a. The Statute of limitations for a *Bivens* action should be borrowed from the most closely analogous federal statute.

The question of what is the appropriate statute of limitation is a question of law that is reviewed de novo. Mendez v. Ishikawajima-Harima Heavy Indus. Co., 52 F.3d 799, 800 (9th Cir.1995). A *Bivens* action does not have a statutory limitation period for filing a cause of action. It is a judicially created remedy without its own statute of limitations. Indus. Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994).

When a cause of action arises under federal law and it does not have a directly applicable limitations period, the court should not assume that no time limit was intended. Del Costello v. Intl. Bhd. of Teamsters, 462 U.S. 151, 158, 76 Ed.2d 476 (1983). In such situations, courts apply the statute of limitations of a closely analogous federal statute, if federal law 'provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking. North Star Steel Co. v. Thomas, 515 US. 29, 35, 132 L.Ed.2d 27 (1995); Reed v. United Transp. Union, 488 U.S. 319, 324, 102 L.Ed.2d 665 (1989); World War II Era Japanese Forced Labor Litigation, 164 F.Supp.2d 1160 at 1180 (ND CAL. 2001).

The application of a federal statute of limitation is a narrow exception to the general rule that a federal court ordinarily looks to the most closely analogous state statute of limitation for guidance as to the period of limitations to be applied to *Bivens* claims and Section 1983 claims. Wilson v. Garcia, 471 U.S. 261, 276-80, 85 L.Ed.2d 254, (1985).

Federal law determines when the statute of limitation begins to run and when the cause of action accrues. Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir.1999). The cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Japanese Forced Labor, 164 F.Supp.2d at 1181. The cause of action accrued on March 16, 1968, when plaintiffs suffered the outrageous conduct at the hands of the U. S. soldiers.

The Tenth Circuit applied the Utah statute of limitation of four years for a civil rights action to the *Bivens* action. Utah borrows the four year statute of limitations for personal injuries for these civil rights actions. Sheets v. Salt Lake County, 45 F.3d 1383 (10th Cir. 1995); Section 78-12-25(3), Utah Code.(2002). Hence, the court dismissed with prejudice Defendants Lt. Calley and Priv. Terry because the action was time barred. It held the action had to be filed by March 16, 1972. It also held that the limitation period was not tolled.

Application of a state statute of limitation to a *Bivens* action for outrageous torts, which are similar to torture, committed in a foreign country, is contrary to

this Court's ruling in Del Costello and Reed, supra; A federal statute of limitation from the most closely analogous statute should be applied to a *Bivens* action. The rationale for this rule is the same as that in support of a federal statute of limitation for an ATCA claim.

b. The applicable SOL for the ATCA is the ten year SOL provided by the TVPA.

The narrow exception of using a federal statute of limitation exists because states do not make their limitations periods with national interests in mind. Therefore, the courts must make sure that the importation of state law does not interfere with implementation of national policies. In re African-American Slave Descendants Lit, 304 F.Supp.2d 1027 (ND Ill 2004).

For example, the TVPA is the most closely analogous to the ATCA action and it borrows its ten year limitation of action period from the ATCA. Papa, 281 F.3d at1012. The ATCA is similar to the TVPA because it addresses torts in foreign nations that violate international law like torture and extrajudicial killings. Therefore, federal law controls the limitation period. Japanese Forced Labor, 164 F.Supp.2d at 1180. See also Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424 at 462 (DNJ 1999); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195-96 (SDNY 1996); and Xuncax, 886 F.Supp. 162 at 192-93(D. Mass. 1995); Doe v. Islamic Salvation Front, 257 F.Supp.2d 115 (DDC 2003).

The Ninth Circuit, in Papa supra,, held that the TVPA is more analogous than the state statute of limitation for ATCA claims. It reversed the district court that had applied the most closely analogous state statute of limitation, instead of the ten years for bringing an action provided in the TVPA. 281 F.3d at 1013. By applying the most closely analogous federal statute, the cause of action was timely. Id. at 1012.

In Japanese Forced Labor, supra, the court dismissed the claims of Chinese and Korean citizens for forced labor against Japan during WWII and ruled that the claims, which arose 50 years earlier, were time-barred. But the court recognized that extrajudicial killing, in a civil action, is a violation of jus cogens norms. For such serious offenses, therefore, TVPA is the closest analogous federal statute of limitation. 164 F.Supp.2d 1160 (ND Cal 2001). This federal statute of the TVPA is the most closely analogous statute of limitation for extrajudicial killings, rape, torture and other violations of international law that occurred at My Lai. It should be applied to both the *Bivens* action and to the ATCA action.

III. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF EQUITABLE TOLLING OF A STATUTE OF LIMITATION TO EXTRAORDINARY CIRCUMSTANCES ARISING FROM WAR.

a. Federal law dictates the circumstances that provide tolling of the statute of limitations for a *Bivens* and ATCA cause of action.

The Tenth Circuit opinion in applying state of Utah tolling provisions to the statute of limitations conflicts with this Court and the Ninth Circuit who have recognized that war based upon federal law tolls the statute of limitations. When a federal claim is presented, federal equitable tolling doctrines apply even if it borrows the state statute of limitations. Cf. Holmberg v. Almbrecht, 327 U.S. 392, 90 L.Ed 743 (1946); Gibson v. United States, 781 F.2d 1334 at 1340 (9th Cir.1986). Federal law recognizes and applies principles of equitable tolling of statutes of limitations to every federal claim. Holmberg, 327 U.S. at 397. When borrowing the limitations period from another federal statute, federal, rather than state, tolling doctrines apply. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1199 (9th Cir.1988). The ten year limitations period for an ATCA claim is subject to equitable tolling. Japanese Force Labor, 164 F.Supp.2d at 1181; Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir.1996), citing S.Rep. No. 249, 102d Cong., 1st Sess, at 11 (1991).

Equitable tolling occurs under federal law in two types of situations: (1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiffs' control make it impossible for plaintiff to timely assert his claim. Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir.19991), *rev. on other grounds*, 503 U.S. 429, 118 L.Ed.2d 73

(1992); Forti v. Suarez-Mason, 672 F.Supp.1531 (ND Cal 1987). Tolling in federal courts is available absent evidence that Congress intended the contrary. Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95-96, 112 L.Ed.2d 435, 443-44 (1990).

Equitable tolling is expressly available under the TVPA. Barrueto v. Larios, 205 F.Supp.2d 1325 (SD Fla 2002), citing H.R. Rep. No. 102-367(I)(1992). In Hilao, supra, the court did not need to decide which statute of limitation applied because equitable tolling applies to the TVPA as well as to a *Bivens* action. The Senate Report on the TVPA provides that the ten year statute of limitation is subject to equitable tolling where the defendant is absent from the jurisdiction or immune from lawsuits and for periods in which the plaintiff is imprisoned or incapacitated. Id. 103 F.3d at 773; citing S.Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991).

Equitable tolling applies when a plaintiff, despite due diligence, is unable to obtain enough information to conclude that there is a basis for a claim. Slave Litigation, 304 F.Supp.2d at 1073. Plaintiffs have been legally incapacitated by the state of war, and the extraordinary circumstances that followed, which ended in April 1997. The extraordinary circumstances that arose from the war have left plaintiffs in a condition like prison, with regard to their ability to learn of their cause of action and to assert it in the U.S. courts.

When the Tenth Circuit applied state statutes of limitation and analyzed their application by the

equitable tolling doctrine of the state of Utah, it failed to place appropriate importance on the federal law concepts of the effect of war and loss of recognition of a country and how these concepts create a disability on a litigant that eliminates his access to our courts. Federal law must be used to toll the statute of limitations for the *Bivens* and the ATCA claims.

b. The Tenth Circuit is in conflict with this Court, the Second Circuit and the Supreme Court of Utah in failing to recognize that the extraordinary circumstances that arose from War toll the Statute of Limitations.

The Tenth Circuit refused to toll the statute of limitations on the *Bivens* and ATCA actions because of war. This decision is in conflict with this Court, the Second Circuit and the Supreme Court of the State of Utah. In Hanger v. Abbot, 73 U.S. 532 [6 Wall.], 18 L.Ed. 939 (1867), this Court found that the Civil War tolled the limitations period for a breach of contract claim until the restoration of peace. This Court explained that when war is imposed by one country against another it prohibits all dealings, commercial intercourse and correspondence between its citizens and those domiciled in the enemy country. The Southern States were the enemy country. The citizens of the South could not sue the citizens of the north because they were denied access to the courts during the war. Justice Clifford compared this disability to the minority of a plaintiff, where the right to sue begins when the individual reaches the age of majority because the disability is removed. Id. Justice Clifford

likewise reasoned that "trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war." Id. Accordingly, the statute of limitation did not run during the civil war.

Likewise, in Osbourne v. United States, 164 F.2d 767 (2d Cir.1947), a plaintiff held prisoner by Japan during WWII was precluded by extraordinary events from bringing his claim and the limitations period was tolled until the barrier caused by the events was removed. When a country is at war, an alien's property may be confiscated, impounded or seized. These property rights are returned at the end of the war. In a similar fashion, the right to bring a cause of action is suspended just as if it were seized or impounded. The alien cannot use our courts during a time of war. Borovitz v. American Hard Rubber Co., 287 F. 368 (ND Ohio1923). War clearly tolls the statute of limitations under federal common law principles.

Likewise, under Utah state law, when a person is an alien or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action. Section 78-12-39, Ut.Code (1953). In Pratz v. International Smelting Co., 213 P.187 (Ut.1923), the Utah Supreme Court held that the two year statute of limitations for a wrongful death action was tolled during WWI because the personal representative was a resident of Hungary, an enemy country. Utah law also tolls the statute of limitations

from running in wrongful death actions until a minor heir reaches the age of majority. Section 78-12-20(minority tolls limitation period for bringing action), -21(time under disability is not part of time limited for commencement of action), Utah Code. The Utah statute of limitation also tolled by war. Section 78-12-39 Utah Code If the statute of limitation is tolled it extends the time in which a remedy be sought for the cause of action. Switzer v. Reynolds, 606 P.2d 244, 245 (Ut.1980). Utah also recognizes that a statute of limitation can be tolled when "exceptional circumstances make it unjust or irrational to bar the cause of action. Myers v. McDonald, 635 P.2d 84 (Ut.1981).

The statute of limitations should be tolled by the extraordinary circumstances that arose from the Vietnam War. The United States withdrew its troops from Vietnam in 1975. The country was left to the invasion of the communist troops. The U.S. had no diplomatic or trade relations with the country of Vietnam after our troops were withdrawn. The United States lifted the trade embargo against Vietnam on February 3, 1994; President Clinton announced he was normalizing relations with Vietnam on July 11, 1994; and official recognition came with the appointment of the first U.S. Ambassador to Vietnam after the war ceased on April 10, 1997.

The relations were normalized in 1995 to increase contact between Americans and Vietnamese people to advance the cause of freedom and to bring Vietnam into the community of nations. Public Papers of the Presidents of the United States,William J.

Clinton, Bk.II-July 1 to Dec. 31, 1995, 1073-74 (US GPO 1996). The first U.S. Ambassador after the war was sent to expand cultural and educational ties, to share information concerning POWs locations, and to establish a full diplomatic relationship. Cong.Rec. Vol. 143, No. 42, S3006-S3010 (April 10, 1997). One month before the Ambassador was sent, the two countries made an agreement to repay money owed the U.S. by South Vietnam for roads, power stations, and grain shipments during the war. Id., S3006.

When the U.S. placed an Ambassador in Vietnam in 1997 it was recognizing the government and state of Vietnam. Such recognition had been withheld since the war, after the U.S. withdrew forces. Recognition is "an official act, such as an exchange of Ambassadors, that acknowledges existence of a government and indicates readiness to engage in formal relations with it. Plano, J and Olton, R, The International Relations Dictionary, 4th Ed. (1988, ABC-CLIO), Para. 338. The recognition of the state indicates a desire to establish access to national courts where rights and duties in the legal relations of the two parties can be defined and controversies resolved. Id., para. 339.

Without recognition and normalizing relations, the citizens of Vietnam are precluded from travel to the United States. The United States would not recognize their passports. A passport is "a legal document issued by a state, which identifies the individual and attests to his or her nationality. ... They are also requests to foreign governments to allow the bearer to travel or sojourn within their jurisdiction and

to grant lawful aid and protection. Id. The Ambassador presides over the activities of the U.S. State Department in Vietnam. One of those functions is to facilitate visas, which allow entry of citizens of Vietnam into the United States. The citizens of Vietnam, domiciled in their home country, without recognition of their government and state, did not have the right to travel to the U.S., to apply for a visa, to use the courts of our country to resolve disputes, or to vindicate their rights. They were effectively denied access to our courts until formal recognition of their government and country on April 12, 1997. This disability tolled the statute of limitations until April 12, 1997.

To determine when the citizens of Vietnam, domiciled there, should be held accountable for and suffer the lost opportunity of exercising or using their right to seek compensation for damages they suffered in the My Lai massacre, or when they had a duty to file their causes of action under a *Bivens* action or an ATCA action, this Court should determine when they had an opportunity to do so. They could not be accountable for failing to exercise this duty before they could get a passport recognized by the United States, before they could secure a visa to come here, or before they could engage in educational and cultural exchanges where they could learn that our country and our constitution protects certain individual rights and allows compensation to victims whose rights are deprived by U.S. actors.

The Vietnam War brought an end to cultural, educational, and civic interaction between plaintiffs

and the United States. Most of the 45 survivors of the massacre were children. This disability precluded their access to the courts within the United States. No one would doubt that a one year old child who is an heir of a victim of the My Lai massacre would have until he reaches age 18 before the limitation period begins to run. This would be from 1968 to 1985. Then, if he were to get ten years under the ATCA, he would have until 1995 to file a cause of action. The dispute that arises is whether the statute of limitation should have been tolled until 1997, because of the extraordinary circumstances that arose from the Vietnam War. This access to our courts was only restored after the war ended, the government was recognized and the United States was again willing to encourage travel, cultural and educational exchanges, and the use of the national courts to resolve differences. These circumstances tolled the statute of limitations until April 12, 1997. Both actions are timely.

This rule furthers the policy that there is no safe haven for death squads in the United States. Barrueto v. Larios, 205 F.Supp.2d 1325. This policy is especially strong if these death squads are members of our own armed forces.

The Tenth Circuit used the state statute for tolling the statute of limitations. Appdx. A at 8a. Generally, when state statutes concerning tolling are not inconsistent with federal civil rights actions, state tolling laws apply. Johnson v. California, 207 F.3d 650 (9th Cir. 2000), after remand, 321 F.3d 112 (9th Cir.2003); Corcoran v. NY Power Auth., 202 F.3d 530

(2d Cir. 1999). The Courts below have used state law to frustrate the purposes of the Alien Tort Statute and a *Bivens* cause of action by failing to give proper weight to the extraordinary circumstances that arose from the war; and how those concepts, which arise from federal and international law, like trade barriers, lack of recognition, failure to normalize relations, deprived the victims of the My Lai massacre of access to our courts.

c. The state tolling provision frustrates important federal policy and was improperly applied to time-bar the *Bivens* and ATCA claims.

Federal courts may adopt any state tolling rules that are not at odds with federal law. Board of Regents v. Tomanio, 446 U.S. 478, 483-86, 64 L.Ed.2d 440(1980).

A *Bivens* action is tolled where a defendants's wrongful conduct, or extraordinary circumstances outside a plaintiff's control, prevented a plaintiff from timely asserting a claim. Hilao, 103 F.3d at 773. See Hardin v. Straub, 490 U.S. 536, 104 L.Ed.d 582 (1989).

A state law on tolling from the forum state should not be used if it frustrates the policy in the federal law on which the claim is based. Strawn v. Missouri, 210 F.3d 954 (8th Cir.2000). When there is a national nature of the claim, and because of the multistate geographic nature of the cause of action. A state tolling provision would permit forum shopping, complex and expensive litigation in what should be a

straight forward matter. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 115 L.Ed.2d 321 (1991).

These actions clearly state a national claim based upon international law and the U.S. constitution for egregious breaches of these standards of conduct abroad. If the statute of limitations and tolling provisions apply from the forum state, then forum shopping will result. For example, Capt. Medina was dismissed without prejudice because the court held it did not have jurisdiction over him because he lacked minimum contacts with the Federal District of Utah so the court did not have personal jurisdiction over him. Plaintiffs are now free to refile their cause of action in his home state of Wisconsin. His state statute of limitation provides that "the time of the continuance of [a] war is not a part of the time limited for the commencement of the action." Wisconsin Stat.Annot., Section 893.20. Arguably, the limitation period for bringing an action did not begin to run until April 12, 1997. The federal causes of action would be timely in Wisconsin if the 10 year limitation period applies.

Likewise, Plaintiffs may argue the statute of limitations in Georgia, where Lt. Calley lives, is tolled by the Vietnam War, Plaintiffs' minority, and the lack of recognition of the country and the other circumstances that arose after the war ended. This forum shopping may be used to defeat the federal policies that should be uniform. In Forti, supra, the court recognized that the law should promote one forum, and a uniform law, for claims for violations of international rights.

Plaintiffs were under the disability that arose from the War in Vietnam until April 12, 1997. The statute of limitations from the TVPA should be applied to both the *Bivens* and the ATCA action. It should be based on federal law, not state law, to provide a uniform remedy, to give proper importance to federal and international issues, and to avoid the expense of multidistrict litigation. The statute of limitation was tolled until recognition of the country, the end of the trade embargo, and normalization of relations with the country and government of Vietnam in 1997. It does not run until 2007. The cause of action was timely filed.

IV. Review by this Court is Important to address additional Important issues raised by the Tenth Circuit.

a. Plaintiffs should have an opportunity to present evidence in support of tolling the statute of limitation.

This cause of action was dismissed on a motion to dismiss. The Tenth Circuit has held that plaintiffs have the burden of establishing a factual basis for tolling statues of limitation. Aldrich v. McCulloch Properties, Inc., 637 F.2d 1036, 1041 n. 4 (10th Cir. 1980). But here, plaintiffs did not ever have an opportunity to present facts that may meet their burden of proof. The district court in deciding the statute of limitations on a motion to dismiss, said the issue is whether plaintiffs are entitled to offer

evidence to support their claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court then dismissed the action, including dismissing *sua sponte* the cause of action against Lt. Rusty Calley, and denying the opportunity to establish or even present facts that support tolling the statute of limitations. A Motion to dismiss is based upon the pleadings. Fudge v. Penthouse Intl. 840 F.2d 1012, 1015 (1st Cir.) Cert denied 102 L.ed.2d 42 (1988). No evidence is considered. It is conceded that if it is futile to amend the complaint then leave need not be given. See Deutsch v. Turner Corp. 324 F.2d 692 at 717 (9th Cir. 2003), where there was no fact that could toll the statute of limitation for 40 years so it was futile to allow an amendment to the complaint.

In the action against Pres. Marcos of the Phillipines, the statute of limitations was tolled until he left office because he had granted himself immunity from suit. This fact was established by expert witness at trial. Hilao, 103 F.3d at 773.

As stated in Reeser v. Cabot Corp., 223F.Supp.2d 644 (ED Pa 2002). A plaintiff has the burden of proof that his lawsuit is not too late. Id. at 648. Whether the statute of limitation should be tolled is a fact question. The factual inquiry should be into whether the plaintiffs exhibit "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others. Reeser, 223 F.Supp.2d at 648. The exercise of reasonable diligence is an objective rather than a subjective standard. Id.

Plaintiffs have been precluded from showing or setting forth facts because this motion was decided on a motion to dismiss. This Court should remand this matter to the district court to allow Plaintiffs to present evidence in support of tolling the statute of limitations.

b. Defendant Calley should not be dismissed with prejudice because he did not join in the motion, he may be liable in another forum, and he should not be protected when other defendants may not have the same protection for the same conduct.

Defendant Lt. Calley, the commander of the troops at My Lai, was dismissed with prejudice when he did not even join in the motion to dismiss. He raised an issue in his answer that the court lacked personal jurisdiction over him. But this issue was never reached. If the trial court lacked personal jurisdiction the proper remedy would be to dismiss him without prejudice. Such a ruling was issued in favor of Defendant Capt. Medina. The action may be filed against him in another jurisdiction. A similar result should follow for Defendant Lt. Calley.

c. It was an abuse of discretion to award attorneys fees when the cause of action was timely, or there was a valid and reasonable belief that such cause of action was timely.

The district court awarded attorneys fees against counsel and plaintiffs because, in part, it felt the statute of limitation had run. See Appdx. B. If this Court finds the statute of limitations was tolled by the extraordinary circumstances that followed the War in Vietnam, then it was an abuse of discretion to award these attorneys fees to Defendant Terry. This ruling should be reversed and remanded so the trial court could determine whether any attorneys fees should be awarded if the action is timely.

For the reasons stated above, the Petitioners pray that this Court will grant the Petition for Writ of Certiorari.

Respectfully submitted,